Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JAMES TAYLOR,

Petitioner,

v.

SUSAN MONFILS, as special administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS, by Bruce R. Bachhuber, guardian ad litem,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a police officer's failure to take affirmative steps to protect the identity of a citizen who reports a crime constitutes a violation of the due process clause by way of the state-created danger theory of constitutional liability suggested in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, City of Green Bay, City of Green Bay Police Department, Cities and Villages Mutual Insurance Company, John Lampkin, Michael Mason, Ken LaTour and Denise Servais were parties before the court of appeals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 165 F.3d 511 and is reprinted in the Appendix hereto at App. 1-26. The order of the United States District Court for the Eastern District of Wisconsin denying petitioner's motion for summary judgment on the ground of qualified immunity is reproduced in the Appendix at App. 29-30. The district court's judgment based upon the jury verdict is reproduced in the Appendix at App. 31-33.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion and judgment on December 23, 1998. (App. 1-28) On January 6, 1999, the court of appeals granted petitioner's motion for an extension of time to file a petition for rehearing to January 12, 1999. Petitioner filed a timely petition for rehearing and suggestion for rehearing *en banc*, which the court of appeals denied on January 28, 1999. (App. 34-35) This petition for writ of certiorari is filed within 90 days of the denial of the petition for rehearing. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Factual Background

On November 10, 1992, Thomas Monfils called the Green Bay Police Department with an anonymous tip that a fellow worker, Keith Kutska, was going to steal an electric cord when he left work at the James River Paper Mill. Monfils wanted to remain anonymous because Kutska was known to be violent. At Monfils' request, Michelle Wickman, a Communications Center Operator, contacted James River's security about the theft report. Kutska was later stopped by security on his way out of the plant and, upon refusing to submit to a search, was suspended from work for 5 days. Wickman did not record Monfils' call in the department computer system because the police had not been dis-

patched to the plant; however, the call was tape-recorded. (Tr. 141, 158-70; Ex. 4, 5)[1]

Monfils' second anonymous call to the police department on November 12 related fear that Kutska would find out who had reported him. Detective Denise Servais assured Monfils the tape would not be released, but she made no written report of the call at the time. (Tr. 178, 1229-47)

On November 17, Kutska called the police department and asked Lt. Michael Mason if incoming calls were recorded. Kutska said that he had not taken anything, but he was still in trouble with management and wanted to clear his name. Mason said he would need to know the time of the call. Kutska then openly told people at the mill, with Monfils present, that he was going to get a copy of the tape. (Tr. 544-47, 1105-06; Ex. 117)

Later on November 17, Monfils called and told Lt. Ken La Tour, a traffic lieutenant then working as a shift commander, that he had placed an anonymous call and that he feared for his safety if the tape was released. Monfils did not identify himself or Kutska. La Tour suggested that Monfils call Specialist John Lampkin, who worked the day shift and normally handled requests for copies of tapes. La Tour did not make a report of the call. On November 18, Monfils called Lampkin, who said the tape would not be released

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[1] "Tr. ___" citations are to the trial transcripts.

"Ex. ___" citations are to trial exhibits, should the Court desire to view them.

because it would have to pass his desk. (Tr. 213-25, 245-49; Ex. 8, 9)

On November 19, Kutska gave Lieutenant Mason the time of Monfils' November 10 call which he had gotten from the James River security guard. Mason found the tape, listened to it, then checked Kutska's record in the police computer and found no arrests or entries. Mason and office manager Shay Gierczak discussed whether the tape should be released with Assistant City Attorney Judith Schmidt-Lehman. Based on Mason's statements that the department had not pledged confidentiality to the caller and that the caller did not sound scared, Schmidt-Lehman opined that the tape was not exempt from disclosure and could be released. Mason then told Kutska he could have a copy of the tape if he brought in $5 and a blank tape. (Tr. 515-21, 547-53, 1308-12)

On November 20, Monfils called Lampkin to ask how long the tapes of calls were kept. Lampkin transferred the call to Deputy Chief of Detectives James Taylor to whom Monfils related what had been happening, but refused to identify himself. Monfils did not want the tape released because he did not want Kutska to know he had reported him to the police. Taylor said he would put a note with the report stating the tape should not be released. (Tr. 566-70, 637-38)

Shortly thereafter, Assistant District Attorney Pat Hitt called Taylor, saying he had just received a similar call from a person who did not identify himself or the person he was afraid of. Hitt opined that the tape was exempt from disclosure under Wisconsin's Open Records law and should not be released. Hitt offered to call

Lampkin to make sure the tape was not released, but Taylor said he would handle it and put a note with the report. Taylor then checked the computer, found no report of the November 10 call, concluded there was nothing he could do, and did nothing further. (Tr. 639-69)

About 4 hours later, Kutska picked up a copy of the tape and played it at work the next day. When Monfils reported for work, he was warned by a co-worker to watch out because Kutska had the tape. Monfils nevertheless reported to his work station where he was confronted by Kutska, who got Monfils to admit it was his voice on the tape. Within about an hour after reporting for work, Monfils was murdered. Six of his coworkers, including Kutska, were convicted of his murder. (Tr. 376, 442-49, 498)

B. Procedural History

Respondents brought this action for damages under 42 U.S.C. § 1983 and Wisconsin law against the City of Green Bay, its insurer and six City employees, five of whom were or are police officers. The action included a substantive due process claim against Deputy Chief James Taylor,[2] claims against the City premised on equal protection of the laws and ratification of Taylor's conduct, and common law negligence claims against all the individual police officers. The district court had jurisdiction over the § 1983 claims under 28 U.S.C.

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[2] Taylor was the only individual defendant charged by respondents in this case with a civil rights violation. None of the other individual defendants were charged with a civil rights violation.

§ 1331 and § 1343(a), and over the state law negligence claims under 28 U.S.C. § 1367(a).

On May 28, 1997, Taylor appealed the district court's May 12, 1997 denial of his motion for summary judgment on the ground of qualified immunity. (App. 29-30) The rest of the case went to trial. On December 17, 1997, the defendants appealed the district court's entry of judgment based on the jury verdict against the City premised on equal protection and, although there was no specific § 1983 finding against Taylor, for ratification by the City of unconstitutional conduct on Taylor's part; the verdict against the individual police officers, including Taylor, on the state law negligence claims; and the jury's award of damages totaling just over $2 million. (App. 21-26, 31-33) The individual police officers did not contest the verdict against them premised on negligence law, but contended they were entitled to state discretionary act immunity.

The court of appeals consolidated the two appeals. On December 23, 1998, the court vacated the finding that the City violated Monfils' constitutional rights to due process and equal protection. (App. 27) The court directed that judgment be entered against Taylor on the individual § 1983 claim against him, finding that even though the constitutional claim against Taylor had not technically been tried, the evidence was sufficient for the jury to conclude that Taylor had placed Monfils in a position of danger greater than Monfils would otherwise have faced and thus violated Monfils' substantive due process rights. (App. 16-18, 27-28) The court rejected the police officers' claim of immunity under state law and affirmed the judgment on the negligence claims

and the damage findings. (App. 19-20) Taylor's request for rehearing and *en banc* review was denied on January 28, 1999. (App. 34-35)

ARGUMENT FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT ISSUE CONCERNING THE UNWARRANTED EXPANSION OF THE STATE-CREATED DANGER DOCTRINE SUGGESTED IN *DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES* TO INCLUDE A GOVERNMENTAL ACTOR'S FAILURE TO TAKE MORE AFFIRMATIVE ACTION TO PROTECT AN INDIVIDUAL AGAINST PRIVATE VIOLENCE BY A THIRD PARTY.

The Seventh Circuit's decision refashions the rule set out by this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), governing the state's failure to prevent injury to individuals by third persons.

The Seventh Circuit ostensibly recognized that Taylor was the only individual defendant charged with a substantive due process violation and, therefore, that only his conduct alone could be considered in determining whether there was a due process violation. The court of appeals also acknowledged that *DeShaney* provides the framework for assessing the due process claim. Yet the court subverted the holding in *DeShaney* by finding that Taylor violated a constitutional duty without ever identifying any affirmative act committed by Taylor which created or enhanced the danger faced by Monfils.

The basis for finding liability against Taylor by the Seventh Circuit was two-fold: 1) that Taylor "knew" of

Monfils' predicament "for he had talked to Monfils about it;" and 2) that Taylor had assured Hitt he would make sure the tape was not released, "but he nevertheless allowed it to get out" by "not following through." (App. 13, 17)[3]

Under *DeShaney*, however, state actors have no due process obligation to protect individuals from private violence. 489 U.S. at 195-97. An affirmative duty to protect does not arise from the state's knowledge of an individual's predicament or promises to aid, but because of the limitation which "*it has imposed* on his freedom to act on his own behalf." 489 U.S. at 200 (emphasis added). Outside a strictly custodial context, the only possibility left open in *DeShaney* where the state might owe an affirmative duty is if a state actor creates the danger or renders an individual more vulnerable to it. *Id.*

This Court has repeatedly cautioned against expanding the concept of substantive due process: "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Specifically, the Court has "previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." *Id.* at 128. The Constitution "does not purport to

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[3] The court of appeals stated that rather than taking steps to prevent the tape's release, Taylor "went deer hunting." (App. 16) This was not fact testified to by Taylor, but only argument made by respondents' counsel. (Tr. 634-35, 1459)

supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

Until now, post-*DeShaney* courts which have adopted the state-created danger theory indicated in *DeShaney*[4] have attempted to heed this caution by predicating liability on an affirmative act requirement—whether the state actor involved affirmatively acted to create the plaintiff's danger or to render him/her more vulnerable to it. *See, Uhlrig v. Harder*, 64 F.3d 567, 572 n.6 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996) (quoting, *Graham v. Independent Sch. Dist. No. I-89*, 22 F.3d 991, 995 (10th Cir. 1994): "This state-created danger doctrine necessarily involves affirmative conduct on the part of the State in placing the plaintiff in danger"); *Carlton v. Cleburne County, Ark.*, 93 F.3d 505, 508 (8th Cir. 1996) (Cases where duty to protect arises "have consistently involved affirmative conduct by government officials directly responsible for placing particular individuals in a position of danger" such that "individuals would not have been in harm's way but for the government's affirmative actions"); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998) (Liability under the state-created danger theory is "predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence").

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[4] The Fifth Circuit, for one, has not adopted the state-created danger theory. *Randolph v. Cervantes*, 130 F.3d 727, 730 (5th Cir. 1997), *cert. denied*, 119 S. Ct. 65 (1998).

While the precise parameters of the state-created danger exception are far from settled, it is of critical note that the state-created danger line of cases finding § 1983 liability, including those cases relied on by the Seventh Circuit below, have all involved affirmative actions by the state itself which created the situations resulting in injury to victims.

For example, in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990), police arrested an intoxicated driver and impounded his car, knowingly leaving his passenger stranded during the night in a high crime area where she was attacked and raped by a third person. The court of appeals concluded that "a police officer may be liable under § 1983 when he abandons passengers of arrested drivers under circumstances which expose them to unreasonable danger." *Id.* at 593.

Various other cases have involved affirmative state action. *See, e.g., Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 356 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990) (state "did indeed create the dangerous situation" by bringing inmate with violent criminal history to work in town hall where plaintiff was employed); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) (potential § 1983 claim based on affirmative action of police chief in directing other officers not to stop estranged husband's violent conduct against decedent); *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993) (allegations that police officers conspired with "skinheads" to permit them to beat up flag burners with relative impunity stated a § 1983 action); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.), *cert. denied*, 510

U.S. 947 (1993) (police officer who removed a sober driver and left behind a passenger with keys to the car subject to liability under § 1983); *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996) (affirmative acts of police in stopping couple walking home from night of drinking, allowing husband to proceed home, then leaving visibly intoxicated wife alone to walk home on cold night created a dangerous situation resulting in injury to wife).

Unlike these cases, the instant case does not involve affirmative action by a governmental official. It is about inaction—Taylor's failure to take more affirmative steps to protect Monfils. The facts are undisputed that Taylor did not create the tape made of Monfils' call to the police department; he did not release the tape to Kutska; he did not direct anyone else to release the tape; he did not know the tape was about to be released; and he took no action to facilitate release of the tape. The Seventh Circuit's decision makes it unmistakably clear that the basis of Taylor's liability was his inaction:

> Taylor did nothing to prevent the release [of the tape.] (App. 5)
>
> But all Taylor did was check the computer system for a report of a November 10th call. Finding no report because, as we know, none was prepared, he did nothing. He did not talk to Lampkin. He did not look for the tape. (Id.)
>
> Taylor took responsibility for preventing release of the tape but did nothing about it. (App. 15)
>
> Taylor also testified that he looked for a report and, finding none, did nothing. (App. 16)

The differences between "creating or enhancing the danger" by affirmative misconduct (where liability exists) and the failure to protect (where liability does not exist) have been noted:

> It cannot be that the state "commits an affirmative act" or "creates a danger" every time it does anything that makes injury at the hands of a third party more likely. If so, the state would be liable for every crime committed by the prisoners it released. [citation omitted] No amount of semantics can disguise the fact that the real "affirmative act" here was committed by [the attacker], not by [the police officer].
>
> * * *
>
> While it is true that inaction can often be artfully recharacterized as "action," courts should resist the temptation to inject this alternate framework into omission cases by stretching the concept of "affirmative acts" beyond the context of immediate interactions between the officer and the plaintiff. (*Pinder v. Johnson*, 54 F.3d 1169, 1175, 1176 note* (4th Cir.), *cert. denied*, 516 U.S. 994 (1995))

No amount of semantics can disguise the fact that the real "affirmative act" in the instant case was committed by Kutska, not by Taylor. While Taylor "could and should" have pursued a search for the tape, he was not "constitutionally compelled to do so." *Brown v. Grabowski*, 922 F.2d 1097, 1116 (3d Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991). Under *DeShaney*, Taylor's mere knowledge of Monfils' situation, as well as his promise to put a note with the report of Monfils' call stating that the tape should not be released, do not afford a basis for finding § 1983 liability.

The finding of liability against Taylor by the Seventh Circuit for his failure to do more to protect Monfils conflicts with *DeShaney*, which squarely rejected the argument that a state omission or failure to act can constitute a substantive due process violation. 489 U.S. at 196-98. It conflicts with the Court's caution in *Collins* against expansion of liability based on substantive due process. It also conflicts with other courts of appeals' decisions, including prior decisions of the Seventh Circuit in somewhat similar situations.

For example, the Fourth Circuit held there was no violation of a constitutional duty in *Pinder v. Johnson*, *supra*, where a police officer arrested the plaintiff's former boyfriend after witnessing his violent behavior and violent threats against her; assured her it was safe to leave her children at home and return to work because the boyfriend would be kept in custody overnight; but then charged the boyfriend with only minor offenses, thus assuring his release that same evening. The court found that, as in *DeShaney*, the plaintiff's case was "purely an omission claim." 54 F.3d at 1176.

Likewise, in a pre-*DeShaney* decision, the Seventh Circuit held in *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), that a dispatcher did not have a constitutional due process duty to dispatch a rescue squad to a woman's home despite the fact that the dispatcher had given both the woman and her friend inept medical advice that breathing into a bag would solve the woman's problems, which advice arguably caused her and her friend to refrain from seeking help from other sources from the time of her first call until she died hours later; also despite the

dispatcher's assurance to the friend that the woman's heavy breathing would not wear her heart out. 847 F.2d at 1213-14.

Following *DeShaney*, the Seventh Circuit held there was no constitutional liability in *Losinski v. County of Trempealeau*, 946 F.2d 544 (7th Cir. 1991), where a governmental actor (Deputy Hovell), agreed to accompany a domestic violence victim to the trailer that she had previously occupied with her estranged husband to get her belongings. The victim would not have gone to the trailer without the deputy agreeing to go with her. Once inside the trailer, an argument ensued between the victim and her husband which lasted for about an hour, after which the victim was shot dead by her husband. Deputy Hovell did not try to intervene to protect the victim—he did nothing. 946 F.2d at 547-48. Plaintiffs claimed that by agreeing to accompany the victim to the trailer, Deputy Hovell became responsible for her welfare and protection because she would not have otherwise gone to the trailer, and that the Deputy's inaction in failing to protect her violated her rights to substantive due process under the state-created danger doctrine. *Id.* at 550. The court of appeals noted that had the deputy not accompanied the victim, she would not have gone to the trailer and that the deputy may have known of the estranged husband's violent tendencies. Nevertheless, there was no affirmative act committed by the deputy which created any danger to the victim. The deputy's failure to act to prevent the victim's murder was insufficient to impose liability upon him.

These decisions are consistent with *DeShaney*—the Seventh Circuit's decision in the instant case is not. The limited scope of respondents' due process claim must be reiterated. Respondents charged only Taylor with violating Monfils' right to due process under the state-created danger theory. They did not charge any other individual defendant under that theory. Specifically, respondents did not charge Lieutenant Mason, who took the affirmative steps of releasing the tape to Kutska, with violating Monfils' due process rights under the state-created danger theory. In holding Taylor liable under § 1983 because he "did nothing," the Seventh Circuit could not have made the point clearer: from now on, despite the plain holding in *DeShaney*, governmental actors will be liable for inaction when a party claims that a governmental actor should have done more to protect a private citizen from danger.

The Seventh Circuit's decision sets an entirely new precedent for determining substantive due process claims against governmental officials for failure to protect individuals from injury by third parties. Supreme Court guidance is necessary and critical to prevent lower courts from eviscerating the principle so plainly clarified in *DeShaney* that a state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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